Supreme Court, U.S.
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No. 05-1571

IN THE

Supreme Court of the United States

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,
Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

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Pursuant to Supreme Court Rule 15.6, Petitioner Ministry of Finance of the Republic of Indonesia files this Reply to disabuse the Court of erroneous points in the Brief in Opposition ("B.I.O."). For the reasons detailed in argument I below, the *undisputed* circuit conflict on choice of law under the FSIA is squarely at issue in this case. Furthermore, this open, percolated conflict puts the Second and Ninth Circuits—the circuits with the heaviest FSIA caseloads—at loggerheads on a fundamental issue under the FSIA (a statute for which Congress was especially concerned about national uniform application). The circuit split both requires and is ripe for this Court's resolution, and the B.I.O. distracts from, rather than illuminates, whether the inter-circuit conflict issue presently before the Court warrants certiorari. For the reasons detailed in argument II below, Respondent fails to address the second issue presented by the Ministry.

* * *

I. Respondent does *not* dispute that there is an express, open conflict in the circuits over whether the FSIA requires federal courts to apply federal common law choice of law rules or forum state rules. *Compare* Pet. 9-10, *with* B.I.O. 19-21. Instead, Respondent ignores or attempts to sidestep the undeniable, clean conflict with five unavailing points:

A. Respondent argues that because Rule 69(a) of the Federal Rules of Civil Procedure provides that execution proceedings "shall be in accordance with the practice and procedure of the state in which the district court" sits, the inter-circuit conflict over whether the FSIA requires a federal common law choice of law rule versus a forum choice of law rule is not at issue here because Rule 69(a)'s provision for state procedures governs. B.I.O. 21-22.

Respondent simply ignores Rule 69(a)'s express exception providing that state procedures bow to any

applicable federal statute such as the FSIA: "except that any statute of the United States governs to the extent that it is applicable." Respondent then misleadingly notes that the advisory committee's note to Rule 69(a) "contains a list of federal statutes governing execution or garnishment of property that the Advisory Committee considered to displace Rule 69. *This list makes no mention of the FSIA*." B.I.O. 21 n.3 (emphasis added).

The list does not mention the FSIA because the Advisory Committee drafted the note when Rule 69 was adopted in 1937—but the FSIA was not enacted until 1976 (and Rule 69 has not been amended substantively since 1970). Notably, the federal statutes on execution and exemption from execution that did exist when Rule 69 was enacted were expressly exempted from Rule 69(a)'s state-procedures requirement: "Statutes of the United States on execution, when applicable, govern under this rule. . . . Special statutes of the United States on exemption from execution are also continued." Fed. R. Civ. P. 69 advisory committee's note to subdivision (a) (1937 Adoption) (noting that such statutes were "among" those exempted). Plainly, the FSIA constitutes both a statute "of the United States on execution" and a "[s]pecial statute[] of the United States on exemption from execution[,]" thus falling squarely within both forward-looking and non-exhaustive categorical exemptions listed in the Advisory Committee's Note. *Id.*

Moreover, until the FSIA was enacted in 1976, the settled federal common law was that foreign states were absolutely immune from execution—regardless of liability. *See* Pet. 16 (collecting cases). Thus, Rule 69(a)'s provision for state procedures could *not* possibly have been intended to govern execution proceedings against a foreign state. Likewise, under Rule 69(a)'s express exception for applicable federal statutes, the FSIA currently governs all aspects of execution

against the property of foreign states—just as the federal common law rule on absolute immunity had pre-FSIA.

While the FSIA unquestionably governs all aspects of execution against the property of foreign states, the statute is silent on the proper choice of law. In this way, the FSIA's attachment and execution provisions are as silent on choice of law as are the FSIA's liability provisions. Indeed, Respondent does *not* dispute the FSIA's silence on choice of law. This statutory silence is the source of the avowed and undisputed circuit split. *See* Pet. 9-10. And for the reasons above, Rule 69 does *not* except this case from the undisputed inter-circuit conflict on choice of law under the FSIA.

Furthermore, the three authorities Respondent cites as purportedly holding that Rule 69 disposes of the circuit split are entirely unilluminating for the Court's determination of whether there is a certworthy split:

(i) *Walker International Holdings, Ltd. v. Republic of Congo*, 415 F.3d 413 (5th Cir. 2005), did not mention the circuit split and the court reached its decision on choice of law with little analysis because the parties did *not* dispute what choice of law rule applied: "[Appellant] acknowledges that Federal Rule of Civil Procedure 69(a) functions to apply state law in garnishment proceedings . . . ." *Id.* at 415. Moreover, the issue in the case (i.e., whether a private party asserting the sovereign immunity of a foreign state could collect attorneys' fees if successful in asserting that defense) did *not* implicate a conflict between federal and state law: "the FSIA does not supply law conflicting with Texas law on the issue of attorney's fees." *Id.* at 416.

The absence of conflict between the federal and state rules in *Walker* is in stark contrast to the choice of law conflict in this case, whereby the New York choice of law rule—authorizing execution on any property that can be

assigned or transferred, including future interests, without regard to whether the property is the debtor's property *only outside the United States*—conflicts with the FSIA's "in the United States" requirement by allowing execution on Pertamina's "future interest" in funds paid to Pertamina by the Ministry outside the United States, i.e., paid in Jakarta, Indonesia. *See* B.I.O. 23 (conceding that such funds "are only finally paid to Pertamina in Indonesia"); Pet. 20 (detailing how the New York choice of law rule creates a loophole in the FSIA's provision of absolute immunity for a foreign state's property outside the United States).

(ii) Similarly, *Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1285 (11th Cir. 1999), did not mention the circuit conflict, and because the choice of law rule was *not* in dispute, the court reached its decision with no analysis beyond a string cite to Rule 69(a).

(iii) Remarkably, *Flatow v. Alavi Foundation*, No. 99-2409, 2000 WL 1012956, at *4 (4th Cir. July 24, 2000), stands for the *exact opposite* proposition from that argued by Respondent. According to *Flatow*:

> Although Rule 69(a) of the Federal Rules of Civil Procedure provides that "[t]he procedure on execution . . . shall be in accordance with the practice and procedure of the state in which the district court is held," *the rule also provides* that "any statute of the United States governs to the extent that it is applicable." Moreover, if the Foundation is the agent or instrumentality of the Iranian Government, then the FSIA is the sole basis for gaining jurisdiction over it. *Therefore, it is appropriate to look to the FSIA.*

(Internal citations omitted) (emphases added).

B. Unable to dispute the circuit split, Respondent argues that the Ministry conceded on appeal that in this case there is

no difference between a federal common law versus New York choice of law rule. B.I.O. 22. But the Ministry's statement that "there is no real conflict here as to which choice-of-law rule to use[,]" Ministry Br. at 42, related solely to the issue of choosing Indonesian law, as opposed to New York law, as the substantive rule of decision: "Without question, under the greatest or significant interest test entailed in the federal or New York choice-of-law rules, Indonesia—***not*** New York—has the paramount interest in this litigation and the underlying dispute." *Id.* at 43. Similarly, the Ministry protected itself by arguing that, "Assuming *arguendo* New York substantive law applied, the Government of Indonesia would still own the PSC Revenues." *Id.* at 48. But this choice of law issue does not concern the threshold jurisdictional issue raised under the FSIA concerning a federal common law choice of law rule to determine what property of a foreign sovereign is amenable to execution. *See Fid. Partners, Inc. v. First Trust Co. of N.Y.*, 58 F. Supp. 2d 55, 61 (S.D.N.Y. 1999) (applying federal common law in deciding that assets outside the United States are not subject to attachment under the FSIA).

No disinterested person could read either the Ministry's opening or reply briefs on appeal as arguing anything other than fervently for the application of federal common law as to the FSIA issues. Ministry Br. at 41 ("The determination of ownership of the PSC Revenues is governed by a federal common law choice-of-law rule because this case involved the amenability of a foreign state and its property to suit and restraint."); Ministry Reply at 17:

> KBC's wrongful attachment of the Government's PSC Revenues raises unique federal concerns: namely, the amenability of the Government to suit, and the restraint of the Government's property when jurisdiction over the Government is lacking. These

> concerns mandate application of a federal common law choice-of-law rule to the question of ownership of the restrained PSC Revenues.
>
> Nor does Rule 69(a) of the Federal Rules of Civil Procedure, which requires use of state practice and procedure on execution, help KBC. Rule 69(a) is limited by any applicable federal statute: it applies the law of the forum state, "*except* that *any* statute of the United States governs to the extent it is applicable." The FSIA governs KBC's attachment of the Government's property held at BofA, *and state practice and procedures cannot displace the FSIA's provisions.*

(Internal citation and footnote omitted) (last emphasis added).

To be sure, the Second Circuit recognized a difference between federal common law and New York choice of law rules, and unequivocally characterized the Ministry as arguing for a federal common law choice of law rule when the court rejected that argument in favor of a New York choice of law rule. *Pertamina I*, Pet.App. 26a ("The latter questions, the Ministry argues, are governed by federal common law choice of law rules. . . . New York choice of law rules therefore govern our decision.") (internal citation omitted).

C. The above excerpts from the Ministry's briefs on appeal also refute Respondent's third conflict-avoidance argument: that the Ministry did not raise on appeal the argument that federal common law displaces Rule 69(a). B.I.O. 23. The portion of the Ministry's Reply brief block quoted above, for example, plainly argues that federal common law displaces Rule 69(a).

D. Respondent's fourth conflict-avoidance argument is that the Second Circuit's failure to apply a federal common

law choice of law rule does not matter because the Retention Fee funds that were improperly restrained under the New York choice of law rule were eventually recharacterized as Refinery Funds and executed upon on that basis. B.I.O. 23.

Respondent ignores that the restraints were only effective because of the improperly applied New York choice of law rule. If this case had arisen in the Ninth Circuit, the courts would have applied a federal common law choice of law rule that would have precluded execution on Pertamina's "future interest" in funds that the Ministry pays Pertamina only outside the United States. Such a rule would have instructed the courts to apply federal common law principles to determine what property lies "in the United States"—principles developed, for example, in the context of the Act of State doctrine, where courts have determined the situs of intangible property to be "where the incidents of the debt, as a whole, place it." *Callejo v. Bancomer, S.A.* 764 F.2d 1101, 1123 & n. 31 (5th Cir. 1985); Pet. 20 & n.4. Under these federal law principles, Pertamina's Retention Fee, incurred and paid in Indonesia for services rendered in Indonesia, falls outside the United States. *See Callejo*, 764 F.2d at 1125 (location of certificates of deposit nominally held by American bank was Mexico, because certificates were issued by Mexican bank, payable in Mexico and American bank was not final repository of deposits); *cf. Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 308 (9th Cir. 1997) (applying federal common law to determine application of FSIA immunity exception).

Under the Ninth Circuit conflict approach, there would not have been money purportedly belonging to Pertamina on which to execute. That *opposite outcome* is the *touchstone of a genuine circuit conflict*, and the fundamental nature of that conflict, particularly under the FSIA, warrants certiorari.

E. Respondent's final argument is that the Ministry prevailed in having the courts apply Indonesian law as the substantive rule of decision, thus the choice of law rule used is irrelevant. B.I.O. 24. The B.I.O. itself shows the fallacy of this argument. Respondent concedes elsewhere that "pursuant to the express mandate of Rule 69, the Court looked to New York law to determine the **types** of property that are subject to execution, that is, to determine 'what assets are subject to enforcement, and thus available to judgment creditors.'" B.I.O. 19 (quoting Pet. App. 22a) (further internal quotation marks and citation omitted).

Thus, it is precisely because the courts below relied on a New York choice of law rule that a "future interest" in funds paid outside the United States was deemed susceptible to restraint. Once that determination was made at what Respondent terms the "first step," B.I.O. 19, the courts' "second-step" application of Indonesian law as the substantive rule of decision could *not* cure the FSIA-contravening outcome of allowing execution on property *not* "in the United States."

II. Respondent likewise sidesteps the Ministry's second issue by framing it as entailing the proper deference due to a State's interpretation of its laws. B.I.O. 12. The issue presented here, however, is whether federal courts, in determining foreign law under Rule 44.1 of the Federal Rules of Civil Procedure, can simply presume that foreign law is the same as U.S. law without undertaking any independent analysis of the underlying foreign law.

Even the cases cited by Respondent, B.I.O 15, support the Ministry's argument that the issue presented is worthy of certiorari because federal courts apply an inconsistent standard with respect to the use of such presumptions under Rule 44.1. *Compare Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212, 216 (3d Cir. 2006) ("The parties, therefore,

carry the burden of proving foreign law; where they do not do so, we 'will ordinarily apply the forum's law.'") (internal citation omitted), *with Curley v. AMR Corp.*, 153 F.3d 5, 13 (2d Cir. 1998) (where parties failed to present Mexican law and district court avoided analysis of Mexican law and applied New York law, Court of Appeals conducted its own independent analysis of Mexican law: "We urge district courts to invoke the flexible provisions of Rule 44.1 to determine issues relating to the law of foreign nations.").

Specifically with respect to the determination of foreign law in this case, neither the district court nor the Court of Appeals considered the Indonesian property concept of "bezitter" as applicable to the Republic's relationship with Pertamina. Instead, the Court of Appeals presumed that the Republic's relationship to Pertamina vis-à-vis the Refinery Revenues was the same as a guarantor under U.S. law.

Respondent concedes that "neither of the courts below used the terms 'bezitter' or 'eigendomsrecht' in their analysis," B.I.O 14 n.1, but argues that the courts' conclusion that Pertamina had exclusive use of the revenues "addressed those concepts and supported a conclusion that they were inapplicable." *Id.* Respondent's argument misses the key point about a bezitter. As a bezitter, Pertamina's possession of the Refinery Revenues entitled it to spend and control those funds for any purpose within its budgetary authority. But the critical determination distinguishing bezitter from owner is whether Pertamina or the Republic has the final right to dispose of these revenues as it sees fit. That right—eigendomsrecht—determines the funds' ownership. Respondent's argument that Pertamina's "exclusive use of the Refinery Funds compelled a conclusion that it owed those funds outright[,]" *id.*, is based on only half the analysis and, as such, does not rebut Pertamina's status as a bezitter. By failing to analyze Pertamina and the Republic's relationship

in terms of bezitter-eigendomsrecht, the courts stopped short of undertaking the next, requisite step to consider whether the Republic had the final right under the BBM legal regime to dispose of these revenues as it saw fit. *Cf.* Pet.App. 37a-38a (conducting a comparative analysis of Indonesian executive branch's law-making discretion with U.S. system).

Respondent's argument that Dr. Gautama has acknowledged in his writings that Indonesian law permits guarantee relationships is a non-sequitur that likewise does not address the issue the Ministry raises. B.I.O. 17. *None* of the opinions of Indonesian law submitted by Dr. Gautama in this case discuss guarantees. The fact that he has written that Indonesian law recognizes guarantee relationships is irrelevant to the issue presented. Nor can Respondent trivialize the Second Circuit's statement that "Indonesia acts like a guarantor," Pet.App. 71a, by arguing the statement is "illustrative." B.I.O. 18. The basis of the Second Circuit's conclusion that Pertamina owns the Refinery Revenues is precisely because it viewed Indonesia's relationship to Pertamina as a guarantor, which "does not deprive Pertamina of control over the refinery funds." Pet. App. 71a.

The Court of Appeals's failure to undertake the requisite analysis of bezitter stemmed from its presumption that the Republic's relationship to Pertamina under Indonesian law was similar to that of a guarantor under U.S. law. Rule 44.1 does not call for such a presumption, and the presumption cannot be sanctioned in the absence of any analysis of the underlying foreign legal principles by the federal court.

* * *

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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